KARINTINA TRADING PTE. LTD.

v.

CORNELDER'S (SABAH) SDN. BHD.

HIGH COURT SABAH & SARAWAK, TAWAU
TUAN IAN H.C. CHIN J
[CIVIL SUIT NO. T. 68 OF 1990]
20 MARCH 1995

***CONTRACT**: Formation - Whether plaintiff had appointed defendant to carry out commodity surveys and to provide warrranty - Inferences from oral evidence.*

***CONTRACT**: Plaintiff's reliance on defendant's survey reports - Whether survey was carried out by defendant in plaintiff's other stores without plaintiff's knowledge - Whether defendants liable for breach - Damages for breach - Whether damages too remote - Causation - Effect of contributory negligence of plaintiff - Whether relevant in contract law.*

***TORT**: Wrong survey report indicating plaintiff had greater amount of cocoa in store - Whether defendant negligent - Measure of damages - Whether same in contract and tort.*

The plaintiff was an importer and exporter of cocoa beans and the defendant was a commodity surveyor who warehoused and warranted cocoa. The plaintiff had an agreement with one Greenfern, a cocoa dealer, who sold and delivered cocoa to the plaintiff. The plaintiff gave Greenfern a RM2.5 million loan to purchase cocoa to be delivered to the plaintiff's warehouse or shipped out to the plaintiff's order. Greenfern was to declare to the plaintiff the purchases of cocoa they made which were sold and delivered to the Greenfern store leased to the plaintiff. The defendant was appointed to carry out independant surveys of the cocoa in the warehouse and report it to the plaintiff.

There was a material discrepancy between the declaration of Greenfern and the survey report of the defendant for 10, 12 and 13 March 1990 which meant that 226.3125 mt of cocoa were missing from the plaintiff's warehouse.

The plaintiff sued for damages for breach of contract and negligence in carrying out the survey. The issues were (i) whether the plaintiff had appointed the defendant to carry out the surveys (ii) whether the defendant had carried out the surveys in the plaintiff's other stores without the plaintiff's knowledge (iii) whether the defendant was negligent in wrongly reporting the amount of cocoa beans in the plaintiff's warehouse (iv) whether the measure of damages for breach of contract and tort is the same (v) whether damages were too remote and (vi) the extent and scope of the defence of contributory negligence on the measure of damages.

Held:

[1] The evidence showed that the then general manager of the defendant had agreed to do the surveys for the plaintiff at a meeting in Singapore. The plaintiff's evidence on this point was preferred.

[2] Even though there was an initial instruction from the plaintiff to survey the Greenfern store, there was no evidence of such instruction to survey the plaintiff's other stores and the plaintiff's evidence that the defendant's employee did not tell her that there was cocoa in other stores which would be included in the survey reports is believed. Even though the plaintiff's witness gave evidence which was suspect in one particular aspect, it did not mean that the whole of her evidence is to be disbelieved.

[3] The defendant was in breach of contract by doing additional surveys of cocoa in the other stores of the plaintiff without informing them. The defendant was also negligent in wrongly reporting the amount of cocoa in the Greenfern store.

[4] Since the wrong in this case is the misstatement in the survey report of the quantity of cocoa in the Greenfern store which survey reports were made pursuant to a contract between the parties, the wrong gives rise to an action in both tort and contract. The law as to remoteness of damage is the same in contract and tort as far as causation is concerned but the protection to the plaintiff may be sometimes wider in contract. Whether the test is applied in contract or tort, the same result would be obtained because if the damage did not arise in the usual course of things or was not in the contemplation of the parties (the test in contract) then it would also be remote or not forseeable (the test in tort) and conversely.

[5] Remoteness has two aspects, one, causation i.e. whether defendant caused the particular damage to the plaintiff and secondly, whether the law protects the plaintiff from the particular damage suffered. The first aspect is answered in favour of the plaintiff as the damage done to them was a result of the innacurate survey reports.

[6] The plaintiff ought reasonably to have taken steps to prevent the loss when they were aware of the missing stock. It was not reasonable for the plaintiff to continue to place their trust on the defendant and its servant by letting them have continued access to the store after the discovery of the missing cocoa. The dissipation of the cocoa from the store was entirely the plaintiff's fault. Therefore, even though the defendant was negligent in submitting innacurate reports to the plaintiff they were not liable for the missing cocoa or the losses arising therefrom. Only the nominal damage of RM1 is awarded with costs.

Obiter Dictum:
Solicitors have a duty to advise clients on full disclosure of documents. They should go through the documents disclosed so that no relevant document has been ommitted. A document is relevant when it is evidence upon any issue and also which may either directly or indirectly enable the other party to advance his own case or damage the adversary's case.

[Plaintiff's claim allowed. Nominal damages of RM1 awarded with costs].

Cases referred to:
Borhill v. Young [1943] AC 92, 106 ***(refd)***
Malaysian Rubber Development Corp. Bhd v. Glove Seal Sdn Bhd [1994] 3 MLJ 569 ***(refd)***
Livingstone v. Rawyards Coal Co. [1880] 5 App. Cas. 25 ***(refd)***
Caparo Industries plc v. Dickman [1990] 1 All ER 568 HL ***(refd)***
Forsikrings Vesta v. Butcher [1986] 2 All ER 488 [1988] 2 ALL ER 43 ***(foll)***
Overseas Tankship (U.K.) v. Morts Dock and Engineering Co. (The Wagon Mound) [1961] 1 All ER 404 PC ***(refd)***
Roe v. Minister of Health [1954] 2 QB 66 (C.A.) ***(refd)***
Sayers v. Harlow Urban District Council [1958] 2 ALL ER 342 ***(foll)***
Lo Khi On v. Tanjong Aru Hotel Sdn. Bhd. [1994] 4 CLJ 550 ***(refd)***
Compagnie Financiere et Commercials du Pacifique v. Peruvian Guano Co. [1882] 11 QBD ***(refd)***

Legislation referred to:
Law Reform (Contributory Negligence) Act, 1945 (UK)

Other source referred to:
McGreogor on Damages, 15 Edn., para 735
Atkin's Court Forms, 2nd Edn. Vol. 15, p. 87
Cocoa - A Trader's Guide, Bronwyn N. Curtis

JUDGMENT

Ian H.C. Chin J:

Introduction

The plaintiff, Karintina Trading Pte. Ltd. ("Karintina"), is a Singapore company and carries on business of importing and exporting cocoa beans ("cocoa") while the defendant, Cornelder's (Sabah) Sdn. Bhd. ("Cornelder"), is a Malaysian company and carries on business in Tawau as a commodity surveyor and of warehousing and warranting cocoa. Karintina had on 22 December 1990, taken out the writ herein against Cornelder claiming damages for breach of contract and or for negligence arising from surveys carried out on 10, 12 & 13 March 1990, and reduced into two reports by Cornelder after being engaged by Karintina. The survey was in respect of cocoa which Greenfern Enterprise Sdn. Bhd. ("Greenfern"), a Tawau cocoa dealer and the trading partner of Karintina, had sold to Karintina. This action was only entered for trial on 28 December 1993, instead of December 1991, and had thus lost precious priority in which it could have been tried. Promptitude, which was missing in this case, is even more important when the evidence, like in this case, depended on recollection from memory. In this case, quite a lot of the chemically treated documents cannot be read as the prints had faded with the passage of time. I will first set out the facts and, where they are disputed, make my findings as well.

The Facts, Disputes & Findings

Karintina had since 1983 been buying cocoa from Greenfern but the documentary evidence of their business relationship covers only the period from 9 January 1989. It was on that day Karintina and Greenfern entered into an agreement ("the agreement") under which Greenfern was given a RM2.5 million loan with a 30 day rollover to enable Greenfern to purchase cocoa which they must give Karintina a first option to buy. For the purpose, the warehouse of Greenfern ("Greenfern store") was leased to Karintina at a nominal rent. Generally speaking, this loan, or whatever balance thereof, was considered repaid when Greenfern delivered to Greenfern store cocoa to that value or have that cocoa shipped out to the order of Karintina. The agreement provides the mechanism for options, for repurchase, for commissions, for fixing prices and for payment of differentials, all of which will be adverted to in detail later on. Documents were adduced at the trial showing Karintina and Greenfern to have entered into cocoa sales contracts pursuant to the agreement covering the months of September and December 1989 and January, February and March 1990. For the purposes of the advances, Greenfern must declare to Karintina purchases of cocoa they made which were sold to Karintina and delivered to the Greenfern store. The evidence thereafter takes us to a meeting in Singapore where there is dispute as to what actually was said or discussed during the meeting.

The Singapore Meeting

On 9 March 1990 a meeting was held in Singapore in the office of Karintina. This meeting was arranged by Yong Meng, the then vice-president (trade, commodity and finance) of Amsterdam Rotterdam Bank, Singapore ("AMRO") and was, to my mind, arranged at the behest of Dirk de Bruin ("Dick"), the then general manager of Cornelder. Those who attended this meeting, apart from Yong Meng and Dick, were Simon Thong and Michael Goh who were respectively from Cornelder's associate's offices in Port Klang and Singapore. Tan Aik Chiang @ Raymond ("Raymond"), the finance director of Karintina represented Karintina at the meeting. Raymond's evidence of this meeting sounds like this:

Q: What was purpose of meeting in Singapore?
A: Karintina bought cocoa from Greenfern and Karintina interested in getting finance from AMRO and Karintina interested in exploring the possibility of putting Greenfern store under the responsibility of the defendants' control and issue of warrants for the cocoa store and report to AMRO.

Q: What was discussed at the meeting?
A: I told defendant's people at meeting that Greenfern was Karintina's supplier of cocoa in Tawau. That Greenfern had rented its warehouse to Karintina for storage of cocoa bought by Greenfern for Karintina. Karintina would advance money to Greenfern for purchase of cocoa and that the arrangement between Karintina and Greenfern was the money would be considered repaid upon delivery of cocoa to the Greenfern store.

Q: What else did you say at the meeting?
A: Karintina trust Greenfern to deliver the right tonnage and quality of cocoa but periodically would engage independent surveyor like Caled Brett (M) Sdn. Bhd. to survey the stock at the Greenfern store. I also told the meeting that Karintina would be interested in getting finance for the purchase of cocoa and AMRO indicated its willingness to finance its purchase provided defendants can issue warehouse warrants for the cocoa in the Greenfern store.

Q: What did the other say?
A: Simon and Michael did not say much. Yong Meng said he would consider the finance if defendants could issue to Karintina the warehouse warrants. Dick said he felt that defendants could do a better job than Caled Brett.

Raymond testified that it was discussed at the meeting "the financing and stock control" of Greenfern store. He said the meeting concluded with Yong Meng stating that AMRO would finance Karintina in their purchase of cocoa if Cornelder was satisfied with the security and operational conditions in the warehouse and if Cornelder was prepared to issue their warehouse warrants for the cocoa in the Greenfern store. It was after this meeting that Raymond instructed her colleague, Yvonne Lim Chuoh Sang ("Yvonne") to engage and instruct Cornelder to do a survey of the Greenfern store which Raymond said Dick had agreed. Prior to this, another surveyor called Caleb Brett (M) Sdn. Bhd. had been surveying and reporting to Karintina. As to what transpired at the meeting, Yong Meng also testified for Karintina and he said that Raymond did not say that much, as he claimed in his said testimony, *supra*, but that Raymond did mention the arrangement Karintina had with Greenfern. Yong Meng also confirmed that Dick had agreed to do a survey of the Greenfern store after Dick had said Cornelder was not agreeable to issuing warehouse warrants in respect of cocoa that were not stored in Cornelder's warehouse. But Yong Meng testified that the financial arrangement between Karintina and Cornelder was not discussed at the meeting. He further said AMRO was, at that time, already financing Karintina on the security of warrants issued by Cornelder. When cross-examined and re-examined, he said he is not sure whether Dick said he will do the survey or whether he said he will consider doing the survey. Yvonne also testified and, *inter alia*, confirmed the instruction of Tommy to engage Cornelder to do a survey of the Greenfern store.

Dick testified for Cornelder. He was in Singapore on 8 March 1990 and he first had a meeting with Yong Meng in AMRO to enlighten Yong Meng of the warehousing system as a financing tool which was already then being employed in Africa and Europe and which it was hoped to introduce to the Far East but I am of the view that this could not be the reason for Dick going to Singapore because Yong Meng had already testified that AMRO was by then already lending money on warrants issued by Cornelder and thus, there was no question of briefing Yong Meng on the mechanics of financing on the security of warehouse warrants

which was by then already known to Yong Meng. Dick said it was the next morning that he attended the meeting with Karintina taking with him his colleagues, Simon Thong and Michael Goh. It can be assumed that Dick enlisted the help of Yong Meng to arrange for a meeting with Karintina for the sole purpose of trying to get the business of Karintina who hitherto was using the said Caleb Brett (M) Sdn Bhd for the survey reports and the Greenfern store for storing their cocoa. Dick was then in charge of Cornelder which operated in Sabah and had its office in Tawau and he was fully aware of the existence of Caleb Brett (M) Sdn Bhd and he also knew that Greenfern was, according to him, quite a well known cocoa dealer in Tawau. I cannot imagine Dick going all the way to Singapore just to pay a courtesy call on Yong Meng if it was not for the purpose of trying to get Karintina to employ Cornelder as surveyors and to use their facilities and there can be no better person to help than Yong Meng because Karintina was then borrowing from AMRO. I also cannot imagine anyone embarking on such a mission without finding out the background of Greenfern and Karintina. It is reasonable to conclude that Dick knew of Greenfern and knew that cocoa of Karintina were being stored in the Greenfern store and that was why he wanted to meet Karintina, which was to get Karintina to use their warehouse and their warrants. That was his primary if not the sole mission. Cornelder charged RM5 for per metric ton for merely handling the cocoa in and out of the warehouse, RM10 if they were to do the export documentation and RM6 per month per metric ton (mt) for storage. Even taking 500 mt, which Karintina had shown they could have in some months, it would mean, just rental only, that Cornelder would be grossing RM3,000. To this figure is to be added the survey fees, charged at RM5 per metric ton, which would mean another RM2,500. All that was needed was for Karintina to agree to use the services and warehouse of Cornelder, money would then be rolling in every month notwithmentioning the spin-offs from the earnings of survey reports that were constantly required. Therefore, it must be Dick who had wanted to meet Karintina as Cornelder was the one who was interested in getting Karintina's business. Thus, I cannot accept Dick's evidence that he had not been told at the meeting the arrangement between Greenfern and Karintina. Karintina had wanted Cornelder to warrant the cocoa in the Greenfern store which he was not agreeable. If he did not know that the cocoa in the Greenfern store belonged to Karintina, he would surely had wondered, had asked and been informed of the nature of the right of Karintina over the cocoa in the Greenfern store in Tawau since Karintina was in Singapore; otherwise the parties would have been talking or discussion in void. It was therefore more probable than not that Dick was told of the relationship between Karintina and Greenfern and at least the reason for Karintina claiming the cocoa in the Greenfern store to be theirs.

Dick also denied that he had at the meeting agreed to do a survey. He said he was surprised to find his colleague and assistant manager of Cornelder, Nicholas Yoong Hou Loong ("Nicholas"), already doing a survey when he returned to Tawau on 12 March 1990. It will be recalled that Yvonne had telephoned Nicholas and gave him instruction to do a survey and Yvonne had followed up with the following telex which she sent to Nicholas on 10 March 1990, *viz*:

> Re : Stock-checking, 10% Weighment, 30% Sampling + Sampling + Analysis at Greenfern Entp Sdn Bhd, Tawau Warehouse
>
> Further to our telecon yest whereby you hv agreed to charge us the rate of RM4.50 Per ton all in Re ABV survey inclusive of faxing/telexing/couriering docs to us.
>
> Can you pls arrg to do the mentioned survey at Greenfern Entp today (10/3/1990) and adv us acdgly.

Why should Raymond instruct Yvonne to call Nicholas to do the survey if Dick had not at the meeting already agreed to do it? I cannot find any reason nor can I find any advantage which Karintina might derive from using Cornelder instead of Caleb Brett (M) Sdn Bhd. as to prompt Raymond to instruct, through Yvonne, Nicholas to do the survey when Dick had not agreed. After all, no warehousing warrants will be issued which warrants were required by AMRO. Therefore, it must have been because Dick had at the meeting agreed to do a survey that Yvonne, after being told by Raymond, instructed Nicholas to do a survey. That Dick should oblige, I venture to guess, could well be because Dick was still hoping to get Karintina's business even though Karintina had not at the metting agreed to using their warehouse and warrants. At least, some fees were gained as a result of the survey and I cannot imagine Dick refusing that. That is not the only reason why I cannot accept the evidence of Dick. Nicholas in his evidence said the first thing he said to Yvonne was that Cornelder does not do stock check and this is his evidence, *viz*.:

> Q: Tell us the conversation she had with you?
> A: Yvonne calls up and ask me to quote her rate for a stock check of Greenfern cocoa at Greenfern warehouse. My first response was that I told her we don't do stock check. She asked why and I explained to her that we are cocoa surveyors and a stock check merely states the number of bags but not the contents and that of course permission from Greenfern must be obtained and hence we agreed to do a survey at a fee of RM4.50 per mt inclusive of faxes, courier charges. The normal rate at that time was RM5.
> Q: Why this discount of 50 cts?
> A: Because she doesn't require a SCGC report.

Thus, according to Nicholas, a survey involving only a stock check is something Cornelder does not do. Therefore, the request of Yvonne to do the survey is something which Nicholas was not accustomed to. He was only an assistant to Dick. I cannot imagine Nicholas taking upon himself to decide to accept the assignment to do a stock check which was not something Cornelder normally did without first getting permission from Dick and this is more so when you take into account the fact when Tommy Teh Thean Tek, the alter ego of Greenfern, requested Nicholas to include cocoa from other stores in their survey reports, Nicholas deferred to Dick. The agreement to do the survey must have come from Dick and this Dick must have agreed at the Singapore meeting. He had somehow communicated with Nicholas and that explained Nicholas' attempt to carry out the survey immediately on 9 March 1990, after he had received the instruction from Yvonne.

Therefore, I prefer the evidence of Raymond and I believe him when he said Dick had at the meeting agreed to do a survey. As mentioned earlier, after Dick had agreed to do the survey, Yvonne telephoned Nicholas and this was followed by the said telex, *supra*. Nicholas alleged that there was further telephone conversation between him and Yvonne which resulted in the instruction of the said telex being varied. Yvonne denied there was such telephone converstation and this is the next issue which I will deal with.

The Telephone Conversation

As mentioned earlier, Yvonne had testified that he had after being instructed by Raymond telephoned Nicholas to do a survey of the cocoa in the Greenfern store and that this was agreed to by Nicholas. It is not disputed that the initial instruction was that the survey was to be in respect only of the cocoa in the Greenfern store. But Cornelder contends that

Karintina had, through Yvonne, over a telephone conversation she had with Nicholas, agreed to the inclusion of cocoa in four other stores to be included in the said survey reports. This is what Cornelder says in their defence:

> 9. (a) In reply to para. 5 and 6 of the amended statement of claim, the defendants had agreed on or about 10 March 1990 to the appointment of themselves to survey the stock of cocoa at the Greenfern store on 10 March 1990 and to notify the plaintiffs accordingly.
>
> (b) However, Greenfern had confirmed in writing to the defendants that part of the cocoa was stored at various warehouses, namely, Sime Darby Store, Manilal Store, Man Lee Seng Store and at the defendant's store.
>
> (c) This information that the cocoa stock was in the said various warehouses was communicated to the plaintiffs and the defendants enquired whether separate survey reports relating to the stock in the respective warehouses were required by the plaintiffs.
>
> (d) The plaintiffs instructed the defendants that the survey information be comprised in one or two reports, rather than in several reports.
>
> (e) The defendants thereafter, as requested by the plaintiffs, carried out the survey of the stock at the Greenfern Store, Sime Darby Store, Manilal Store, Man Lee Seng Store and Cornelder Warehouse and submitted the requiste information in two (2) reports to the plaintiffs, (hereinafter "the said survey reports").
>
> (f) The reference to "the Greenfern Store/Warehouse" in the said survey reports was a matter of terminology understood by all concerned to mean and include, and was so understood by the plaintiffs and defendants to mean and include the cocoa stored at the various warehouses mentioned in para. 9(b) above in addition to the Greenfern store.

Nicholas explained that it was a requirement of the Sabah Cocoa Grading Council ("SCGC") that every survey report must contain details relating to the quality and quantity of the cocoa, *viz*.:

> (1) a 30% random sample must be taken by probes of 150 gm to 180 gm per probe which should be combined to form a composite sample;
>
> (2) the composite sample must then be quartered with each quarter weighing 200 gm to 500 gm and the number of beans per 100 gm of each quarter is then counted (the smaller the count, the better the quality) and the quantity of waste was also determined;
>
> (3) about 300 beans were to be halved and examined by the naked eyes to determine defects like, mouldines, slatiness and degree of fermentation which must not exceed 3%; and
>
> (4) the tonnage was determined by dividing the total number of bags by the factor of 16 and then times the result with 62.5 which sum will be the total metric ton.

Nicholas testified that the charges for the works specified was RM5 per metric ton but had reduced it to RM4.50 for Karintina because an SCGC report was not required. He said he knew Yvonne very well and that they communicated mostly over the telephone. In this regard, Nicholas said it was on 9 March 1990, that Yvonne telephoned him. As for the rest of his evidence in connection with this issue, it is best I reproduce them, *viz*.:

> Q: Why this discount of 50 cts?
> A: Because she doesn't require a SCGC report.

We agreed to do the survey at RM4.50. I called Greenfern because she said over the phone that she wanted it done immediately but Greenfern told me they did not have instruction. I could not remember for sure who of Greenfern told me but I think it was Miss Chok. I informed Yvonne of this over the phone. On 9/3 I had at least 2 telephone conversations. When I told Yvonne what Chok told me she said she will get back to me. She phoned me later and told me she had spoken to Greenfern and that I could do the survey the next morning. 9/3 Dick was not in office in Tawau. I knew he was in Kuala Lumpur. I did not know he was in Singapore. Yvonne did not tell me that Dick was in her office or had meeting with her. [Witness shown P2.] This was a telex from Yvonne dated 10/3 for my attention and the telex confirms the previous day telephone conversation. On 10/3 our surveyors headed by Joseph Fong went to Greenfern store and then later on Fong called me from Greenfern store. Fong told me that cocoa was not ready and I asked him when it would be ready, he told me Monday (12/3). I then told Fong to come back to the office. I then rang Yvonne to tell her of this further delay. Yvonne did not say anything. 12/3, because of 2 days delay, I went to Greenfern warehouse assisting my surveyors to do bags count. The surveyors were four, namely Fong, Liew Chee Vui, Cyril Edward and Abdul Rahman. I saw a stock of cocoa there. The cocoa then at the store was about 75% full, we started our surveys by forming two teams. [Witness shown p. 156 Bundle B.] This is written by me. It was written on 2 occasions while I was doing this bag count I was told by one of office staff that Tommy Teh would like to see me. I went and met him in his office. He told me that he has bought some cocoa but not able to be delivered to his store yet and asked me if I could include them in the survey report. I did not agree to the survey report because the telex I received says I was to do survey specifically at Greenfern store but he told me that it was the same. I said I will speak to my boss. So I went back to the office and informed my boss Dick. Dick asked me what it was about and I told him the conversation. I had with Tommy. He said he will agree provided Karintina knows about this and Greenfern must give us a letter. I phoned Tommy and asked him for a letter. I also phoned Yvonne and informed her but at that I did not know the exact tonnage but he mentioned some cocoa. Tommy did not at that time state the tonnages of cocoa in the other stores. After that, I continued doing bag count at Greenfern store.

Q: Did surveyors beside working in Greenfern store that day worked in other stores?
A: Yes. On the 12/3, afternoon I went back to the Greenfern store. The surveyors went to Sime Darby Warehouse, Manilal Warehouse and Mun Lee Seng Warehouse.
Q: Did you have to work extra hours on 12/3 to complete your survey?
A: Yes.
Q: What time did you work up to?
A: 3 of our surveyors worked till 8.00 p.m.

[Witness shown p19.] This is the letter I obtained from Tommy on 12/3 or 13/3. Letter also states there is 110 tons at defendant's store.

I intercede here to reproduce the letter of Tommy mentioned in the just-quoted evidence, *viz*.:

12 March 1990

Cornelder's (Sabah) Sdn. Bhd.,
... Tawau, Sabah

Dear Sirs,

We confirm that we have the following cocoa Beans which we have paid and these are for Karintina Pte Ltd to be delivered to Greenfern's store later:

(1) 80MT (B/C 110) in Sime Darby's store.

(2) 20MT (B/C 110) in Manilal's store.

(3) 20MT (B/C 110) and 30MT (B/C150) in Mun Lee Seng's store.

(4) 110 (B/C) in Cornelder's store.

Thanking you for your attention on the above matter.

Yours faithfully,
Greenfern Enterprise Sdn Bhd.
(Signed)

Manager.

By this time, Yvonne had received a facsimile (P121) from Tommy declaring the stock of cocoa at Greenfern store to be 860.5625 mt. The further evidence of Nicholas reads:

> Q: Was there any discussion on 12/3 with Yvonne Lim as to number of report that defendant should make?
>
> A: Yes. When I returned from Greenfern store after bag count, I called Yvonne telling her that Greenfern has cocoa at other stores and the tonnages was given verbally to her and since we always do separate analysis for each different grade and different premises, I asked her if she would like to receive our survey reports in one or two reports and each individual report to reflect cocoa in each store. She confirmed she only required 2 reports because we are talking about 2 grades of cocoa; one was SMC 1B and the other was sub-standard.

Nicholas testified that it was as a result of Yvonne agreeing to having two reports for the cocoa in the Greenfern store as well as in the other four stores, that the two reports were accordingly made, one of which reads:

Cornelder's
(Sabah) Sdn. Bhd.
...

Survey Report

Our ref	:	1381, 3, 4, 5/130390
Owner	:	Greenfern Enterprise Sdn Bhd P.O. Box No. 267, 91007 Tawau
SCGC NO	:	0016
No. Of Bags	:	8419 (526.1875 MT) approximately
Marking	:	Nil
Date	:	10, 12 & 13 March 1990
Store	:	Greenfern Warehouse
Storage no	:	-
Supplier	:	-
Bean Count	:	111/100
Waste	:	2.23%
Moisture Content	:	6.9%
Smokey or Foreign Odour	:	NIL

Cut Test

Mouldy	:	0.5%
Slaty	:	1.0%
Insect Damaged	:	1.0%
Germinated	:	1.5%
Purple	:	8%
Purple/Brown	:	15.0%
Brown	:	73.0%

Gross wt	:	Avg per bag 63.3 kg
Nett wt	:	Avg per bag 62.3kg (nett)
Remarks	:	All bags are stacked in stockpile. Unable to get 30% Random sampling. Bags count based on counting layer per layer from the out-side of the pile.

(Signed)
Dick De Bruin

Issued at the same time was another report for the date of 13 March 1990, and it was in respect of 1729 bags weighing approximately 108.0725 metric ton. This report also contains qualitative and quantitative test results and contains a similar remark. Yvonne, as mentioned earlier, denied the telephoned conversation in which she was alleged by Nicholas to have been told about the cocoa being in four other stores and that she had agreed to the inclusion of those cocoa of those stores. Mr. Cecil Robertson, Counsel for Cornelder, argued that Yvonne'e evidence is not to be preferred. Mr. Robertson submitted that Yvonne had been inconsistent and illogical because she was on 12 March 1990, aware of the 200 metric ton discrepancy. This contention came about because at the very beginning of the cross-examination, the following question was asked and the answer given *viz*.:

Q: When you became aware of discrepancy on 12/3/1990 based on 2 declarations of Greenfern, at pp. 77-78 Bundle B, the amount was 226 tons?

A: Yes.

Read in isolation, it would appear that she had said she discovered the discrepancy on 12 March 1990. But, it is a multiple questions lumped into one. She could have meant that (1) she discovered the discrepancy on 12 March 1990, (2) she discovered the discrepancy based on the declarations and (3) the discrepancy was 226 tons. This is the folly of putting multiple questions in one. She had in her examination explained at length how she discovered the discrepancy only after receiving the survey reports and only after comparing the figures given in the survey reports with that given by the declarations. She had further explained later on in her cross-examination that it was on 14 March 1990, that she came to know of the discrepancy. When her answer is read with the rest of her evidence, she could not have meant she discovered the discrepancy on 12 March 1990. I see no substance in all the arguments that was based on the contention that she had said she discovered the discrepancy on 12 March 1990, since that underpinning supposition, for the reason I have stated, is shown to be wrong.

It was next submitted by Mr. Robertson that her evidence is unreliable because by 14 March 1990, the cocoa according to the declaration dated 12 March 1990, (P122) were only 660.5625 mt while the survey reports adverted to 634.25 mt and that thus, there was only a discrepancy of 26.3125 mt which contrasted with the allegation of Yvonne that there was a discrepancy of 226.3125 mt. Yvonne had based her conclusion by reference to another earlier declaration which gave the figure of 860.5625 mt. Mr. Robertson further submitted that her evidence is further contradicted by the fact that the facsimile of Tommy dated 12 March 1990, (P123) adverted to two "repurchase contracts" numbered respectively S504/1095 for 50 mt and S504/1102 for 150 mt which made it illogical for her to have pursued the missing 200 mt any further since, according to Mr. Robertson, the amount had been accounted for by the "repurchase contracts" which are also called "washouts". Finding out what all those transactions mean will go a long way towards explaining the position. This means going back to the agreement (P170), referred to at the outset of this judgment and which governed the relationship of Karintina and Greenfern. The terms of this agreement read:

1. K to lease G's store in Tawau for a nominal rental. Legal costs for K's a/c.

2. G to grant K first refusal on all cocoa bought by G in Sabah.

3. G to disclose to K all purchases made outside Tawau upon purchase and to offer to K at a price. If K refuses the offer, G is free to sell elsewhere with £5 commission for K.

4. K not to buy cocoa in Tawau from estates of less than 500 acres. K is free to buy in Tawau from larger estates, in which case K to pay G £5/T, or from other exporters with no commission payable.

5. K grants G a pre-delivery facility of £2.5m, with 30 days roll-over. This facility is to operate like the current one except:

   a) advance considered repaid on delivery to store

   b) G may draw without fixing differential, but instead a commitment to deliver a certain tonnage. G may draw up to 90% of current market value.

6. Interest on advance to cease when goods are ready for export in the store. The interest may therefore run beyond the date upon which the cocoa is delivered to store and transfer of title to us. (This would occur when G wishes to blend the cocoa before export.)

7. When goods ready for shipment and price is fixed, GF entitled to receive 100% FOB value.

8. Where G has drawn an advance without fixing price or differential, G and K must agree to the differential (or outright price) not later than arrival of the corresponding cocoa to store.

9. Procedure for setting the differential (or outright price) is as follows:

   a) G requests K to bid

   b) G either accepts this bid or counter-offers

   c) If G counter-offers, K either accepts this counter offer or declines

   d) If K declines, offsetting differential contracts are established whereby G sells the cocoa to K and K sells back the cocoa to G at differentials that provide to K a profit of £5/T. (e.g. G sells to K at £175 under March K sells to G at £170 under March).

   e) K, having declined G's counter offer in (b) above, has the option to sell to G an equivalent tonnage at the same price. (E.g. if G has 50T to sell and declines K's bid of £175 v term for this 50T and counter offers £150 v term and K declines this offer, K then has option to sell to G 50T at £150 v term.)

   f) G has option to take delivery of cocoa they have purchased under (d) above any time between 5 and 30 days from date of purchase. K has option to tender this cocoa to G after 30 days from date of purchase.

   g) In event G has purchased the cocoa, G will compensate K for interest from the date of the advance until G takes delivery of the cocoa and for insurance covering the period of storage.

10. If G, having received an advance representing the value of 110/100 cocoa, delivers a consignment of higher bean count, G to repay K the difference in value. For the time being this difference in value is calculated at the rate of RM10 per bean count above 110/100. This clause has no bearing on the procedures outlined in 7 and 8 above.

11. Pricing to be on FOB basis. GF to rebate K if K requires local delivery.

12. G is responsible for weights and quality up to final destination. Contracts will be CALA15, calling for:

a) Delivery to store

b) FOB charges for seller's a/c

c) Quality and weights final at desination

d) all other terms per CALA4

13. K, being the lessee of the store has access at all times, K, being the owner of the goods in the store, has the right of inspection at all times. Any survey fees for K's a/c. GF and K each to hold keys.

14. G acts as K's agent for taking delivery of goods into the store and preparing the goods for shipment according to the agency agreement dated 9/1/1989.

15. At G's request and provided G is not storing more than 50T for other buyers, K will remove any cocoa in the store in excess of 300T. This is to avoid store becoming too congested. G is entitled to hold up to 50T of cocoa in the store.

16. G has option to repurchase from K 25% of what G has sold (net of repurchases in 9 above) calculated annually but subject to maximum repurchase figure of 35% of any one month's sales. G to compensate K £10 PMT on whatever in thus repurchased. The terms of repurchase are:

a) Price is at K's ruling purchase differential for prompt shipment.

b) K has option to deliver any time within 30 days.

c) Interest and attributable insurance premium for G's account until delivery.

17. Insurance cover of goods in store is for K's account

18. If, as a result of inspection by K or K's agents, a parcel of cocoa is found to be inferior in quality or short in weight K has right to reject the percel and to demand reimbursement of whatever K had paid for the parcel. K's rejection supported by a report issued by a Fama-approved surveyor shall be final. Rejected parcels are to be replaced within one week. For the purpose of this clause:

Inferior in quality means either bean count more than 3 beans higher than contracted or moisture more than 8.5% or resideue more than 4% or defects more than 5% or slate, more than 5%.

Inferior in weights means weights less than 99% of weights declared.

19. This agreement is subject to termination by one month's notice by either side.

20. Goods declared ready for shipment cannot be substitued once surveyed.

...

In this letter "G" denotes Greenfern Enterprise Sdn Bhd and "K" denotes Karintina Trading Pte Ltd.

As for the 860.5625 mt of cocoa that were declared by Greenfern through their facsimile (date illegible) (P121), they were paid by seven cheques (P60 (a)-(f) and P174) between 1 January 1990, and 20 February 1990. Though the witnesses concerned were not asked to explain, a perusal of the exhibits and the evidence of Raymond establish that this 860.5625 mt were in full and part fulfillment of the various contracts shown in the following Table:

i h g f e d c b a

TABLE

Contract (Exhibit) No.	Date	Particulars	Payment By Karintina	Declared Delivered By Greenfern (P121)	Balance to Be Delivered	Washed out By Repurchase Contracts
504/1071 (P173)	16 February 1990	220 mt @ £153 under March 1990	23 January 1990 - RM387,200	25 mt	195 mt	None
504/1074 (P172)	16 February 1990	30 mt @ £153 under March 1990	25 January 1990 - RM 54,000	30 mt	Nil	None
504/1075 (P100)	23 February 1990	240 mt @ £162 under May 1990	05 February 1990 - RM441,000	70 mt	75 mt	S504/1086 (12 February 1990)
504/1075 (P101)	26 February 1990	5 mt @ £165 under May 1990			5 mt	S504/1092 (26 February 1990)
504/1983 (P107)	06 March 1990	30 mt @ £165 under May 1990	13 February 1990 - RM57,000	30 mt	Nil	None
504/1084 (P109)	08 March 1990	285 mt @ £150 under May 1990	15 February 1990 - RM541,500	135 mt	150 mt	None
504/1085 (P110)	09 March 1990	150 mt @ £165 under May 1990	19 February 1990 - RM674,500	Nil	150	S504/1102 (9 March 1990)
504/1085 (P113)	12 March 1990	205 mt @ £146 under May 1990		205 mt	Nil	None
504/1087 (P112)	12 March 1990	195 mt @ £146 under May 1990	20 February 1990 - RM370,500	90 mt	105 mt	S504/1108 (16 March 1990) 100 mt
None	None	Bean Count 150/100	None	125.5625 mt	Nil	None

It can be gathered from the Table, *supra*, that Greenfern had declared to Karintina that they had delivered to the Greenfern store a total of 860.5625 mt of cocoa. Greenfern in a subsequent declaration (P122) adverted to two repurchase contracts no. S504/1095 for 50 mt (document not produced) and S504.1102 dated 9 March 1990, for 150 mt (P111) which thus reduced the figure declared earlier by 200 mt. and the total therefore, became 660.5625 mt. Thus, according to Mr. Robertson, by 14 March 1990, Yvonne should have realised that the discrepancy should be reckoned by comparing the amount reported by Cornelder (P3(a) & (b)), which was 634.250 mt, with the amount declared by Greenfern (P122), which was 660.5625 mt, and that the discrepancy was only 26.3125 mt. Thus, it was submitted, it did not make any sense for Yvonne to telex Tommy on 14 March 1990 (P61) to demand an explanation for 226.3125 mt when the discrepany was only 26.3125 mt. Mr. Robertson argued that it was therefore, not safe to rely on the evidence of Yvonne. Yvonne's telex (P61) reads:

> Re Yr Stock Valuation as at 10/3/1990, the Total Stock is 735mt (Bc 110) + 125.5625 Mt (Bc 150).
>
> Pls Note Cornelders Report Showed 526.187Mt (Bc 110) + 108.0625Mt (Bc 150).
>
> Pls Cud you Clarify and Revert Urgently What Happen to the Balance 226.3125Mt.

I cannot agree with the contention of learned Counsel. The agreement, *supra*, provides for all cocoa of Karintina to be stored in the Greenfern store. Money was advanced against the contracts signed between Karintina and Greenfern and were only considered repaid when the cocoa to that value were either delivered to the Greenfern store or shipped out to the order of Karintina. Before the cocoa were shipped out, Karintina would have to keep tab of their cocoa in the Greenfern store and this they had been doing by comparing the declarations of Greenfern with the survey reports of Caleb Brett (M) Sdn. Bhd. As for the two repurchases of a total of 200 mt by Greenfern, the transaction presupposes the existence of the cocoa which Greenfern had declared they had delivered to the Greenfern store which means that even if Greenfern had wanted to repurchase the cocoa, the cocoa must be present physically in the Greenfern store which means that even if Greenfern store and the repurchases involved payment for the cocoa beans by Greenfern which payment must be made before the cocoa can be removed from the Greenfern store. It was as a result of comparing the declaration (P121) and the survey reports of Cornelder of 10, 12 & 13 March 1990, that Yvonne realised cocoa to the tune of 226.3125 mt were missing from the Greenfern store. This missing cocoa was made good by Greenfern entering into the said repurchase contracts and by subsequently paying the amount due under the repurchase contracts. This does not mean that the cocoa had not gone missing and this does not obviate the need for an explanation by Greenfern why cocoa that was supposed to be in the Greenfern store was not there. Hence, the perfectly logical move of the said telex (P61) which Yvonne sent to Tommy. I do not see any inconsistency or illogicality in her evidence in this regard as to render her an unreliable witness. What, then of Nicholas' evidence with regard to the alleged telephone conversation with Yvonne?

As was said earlier, Nicholas was only an assistant and what Yvonne requested, according to him, was a stock check which was not something which Cornelder does. If that is the case, it is to be expected that Nicholas would defer to his superior, Dick, but he himself, we are asked to believe, instead decided on taking the job. I cannot accept that. And not only that, he decided on the reduction of the charges as well which stretches his authority far too far for credibility. There is also the precaution he took of procuring the letter dated 12 March 1990 (P19); if he had really spoken to Yvonne about incorporating the cocoa of

the other four stores, he would surely, upon receipt of this letter sent it to Yvonne together with a note to confirm the alleged agreement of Yvonne to include the cocoa of the four other stores in the survey reports. That he was cautious enough to procure the letter would surely lead one to expect him to be similarly cautious when dealing with Yvonne and forward the said letter to Yvonne since the telex of Yvonne refers explicitly to Greenfern store. That this was not done belies his allegations regarding the telephone conversation. Similarly, the survey reports that he compiled contain two rows for insertion of detail, (1) relating to the ownership of the cocoa and (2) relating to the name of the store in which the cocoa were placed but it was stated that Greenfern was the owner and that the store was stated to be the Greenfern store. If what Nicholas alleged regarding the telephone conversation was true, it could easily have been inserted in the survey reports the fact that the cocoa were in the other four stores as well since a row is provided in the report for such information. Again, that it was not so stated belies the allegation of Nicholas and he never explained why he did not so state. It was submitted that there was no reason for Nicholas to have done what he did. It must not be forgotten that it was Nicholas who had said that Tommy had approached him for help to include in his reports cocoa in the other stores. The evidence tends to suggest that Nicholas and Dick though that it was alright to include the cocoa of the other stores since Tommy had stated in writing that the cocoa were for Karintina. That was the reason, if a reason is required at all, why they thought nothing of including the cocoa of the other stores in the survey reports as if they were in the Greenfern store. When Nicholas first went to the Greenfern store, Nicholas alleged that it was probably a Miss Chok who told him on 9 March 1990, that she had no instruction to allow the survey but it was not challenged when Tommy gave evidence that he was in Kuala Lumpur at that time and that he gave permission for the survey to go ahead after he received a call from his office which contradicted his contention that he was not allowed to do the survey that day. Yvonne gave specific instruction in her telex that the survey was to be done on 10 March 1990, and I find it difficult to accept that Nicholas called his men to return after being told by his man that the "cocoa was not ready". Any person in his situation would surely had enquired why the "cocoa was not ready" for survey but Nicholas did not enquire. Therefore, for the reasons stated, I believe Yvonne when she said Nicholas did not tell her that there were cocoa in other stores which will be included in the survey reports. There are other evidence in this case which Mr. Robertson argued which demonstrated that Karintina did not rely on the survey reports and it is to those evidence that I will now turn to.

Capacity of Greenfern store

Mr. Robertson submitted that because the Greenfern store could only have a practical capacity of between 350 mt to 500 mt and that Karintina knew or ought to have known about this, Karintina could not have been misled by the survey reports since any cocoa in excess of that capacity must, to Karintina's knowledge, have been stored elsewhere other than in Greenfern store. Therefore, according to Mr. Robertson, when the declaration (P121) states an amount of 860.5625 mt, Karintina knew this could not all be stored in the Greenfern store and knew that they were stored in other stores as well. As for this argument, it has to be pointed out there is no evidence that Karintina or any of its officers knew that the Greenfern store cannot take more than 500 mt. Even assuming for the moment that the Greenfern store cannot take 500 mt, the evidence shows that Karintina was unaware because they were not alarmed and continued to advance money when the declarations of Greenfern showed that the Greenfern store had been delivered cocoa well in excess of the 500 mt. There was some drama during the trial of this case in this regard. Dick, in the course of being examined, threw a dare to Karintina which was that if Karintina could put 1,000 mt of cocoa in the Greenfern store, Cornelder will concede the case. In this part of the world, we often hear of

challenging an opponent to cut the head off a white cockerel to attest to the truth of a person's testimony upon pain of being accursed, but this challenge of Dick was quite a revelation but it was countered with a challenge from Karintina, put through their Counsel Miss Peggy Liow, and that was, if Karintina can put all 850 mt ton of cocoa, which Cornelder should provide, inside the Greenfern store, the cocoa will then belong to Karintina. Neither challenge was accepted. What can be said to be the truth of the matter is, I am of the opinion, that the Greenfern store cannot take more than 850 mt. Dick contended only 500 mt could be taken because there must be working space and forklift must be used but he forgot the evidence of Tommy that the work area of Greenfern was outside the store in a covered area. Neither was it shown or demonstrated how it was not possible without the use of a forklift that the bags cannot be stacked to the capacity of 850 mt. I am therefore unable to agree with Mr. Robertson that Karintina could not have been misled on account of the impossibility of the Greenfern store to take more than 500 mt.

Physical Delivery of Cocoa.

Mr. Robertson then submitted that the numerous "washouts", that is repurchases, should have alerted Karintina that something was amiss and in March 1990 there were 6 (actually 7) washouts totalling 945 mt and, continued Mr. Robertson, since Karintina ought to have known, they could not have been misled by the survey reports and Karintina therefore, did not place any reliance on the physical presence of the cocoa. Underlying this argument is the assumption that "washouts", that is repurchases, were unusual. How can this be when the agreement, *supra*, expressly provides for such a mechanism. For January 1990, out of 17 contracts, there were 8 "washouts"; For February 1990 there were 13 contracts in which 7 were "washouts" and in March 1990, out of 13 contracts there were 7 "washouts". The "washouts" aside from being provided for under the agreement, were usual every month. I am therefore unable to accept the argument that just because there were a lot of "washouts" Karintina knew something was wrong and could not have placed any reliance on the existence of the physical stock. If what I have said is not reason enough to reject the argument, surely the leasing of the Greenfern store by Karintina demonstrates the need for a place to store the cocoa and the employment of Caleb Brett (M) Sdn. Bhd. to keep track of them is surely manifestation of a desire to keep track of the physical cocoa.

Diagrams & Survey Reports

Diagrams and survey reports were the next bone of contention. It will be recalled that I have mentioned Caleb Brett (M) Sdn. Bhd., the erstwhile surveyor. The documents produced establish that they did 4 surveys, on 1 April 1989, 31 August 1989, 13 & 28 February 1990. Though Mr. Robertson had submitted that Yvonne had said these surveys were done every two weeks the notes of proceedings clearly show otherwise. She had testified (at p. 41, line 3, of the notes of proceedings) that the surveys were done in intervals of more than 2 weeks. It will also be recalled that the first survey by Cornelder was done on 10, 12 & 13 March 1990 and the second survey on 28 March 1990. Mr. Robertson submitted that it was strange to have 4 reports for the period February to March 1990. Yvonne had explained that they could have been more surveys by Caleb Brett (M) Sdn. Bhd. but that the files were misplaced. If it was thought important for the case of Cornelder, Caleb Brett (M) Sdn. Bhd. could have been subpoenaed to give evidence on the number of survey reports but Cornelder chose not to do so. There is therefore no ground for complaint. In any event, it has not been established by Cornelder that the volume of cocoa trade in 1989 was far more or equal than that of the first quarter of 1990 to support the contention that it is strange to have so many reports in 1990 while there only 2 for 1989 when the volume of cocoa traded was of a similar quantity or more in 1989. This was not established.

As for the diagram, the argument was developed this way. Tommy had testified, during cross-examination, that every one of his declarations of the stock of cocoa was accompanied by diagrams of the Greenfern store and that Karintina would have had a copy of the diagram before Cornelder did the survey on 10, 12 & 13 March 1990. This evidence was not challenged by any quarter and I assume that was the actual position. For the survey of 10, 12 & 13 March 1990, Yvonne did not send any diagram to Cornelder though she sent one for the second survey done on 28 March 1990. This, according to Mr. Robertson, shows that Karintina was only on 28 March 1990, interested to know the exact location of the cocoa in the Greenfern store and before that, Karintina only wanted to know the cocoa belonging to Greenfern and not where they were located. This contention arose because Yvonne did not agree that by then she suspected something was wrong and she went on to say, incomprehensibly, that she sent Cornelder the diagram on 28 March 1990, because they had done a good job on 10, 12 & 13 March 1990. It is incomprehensible because if a good job was done before without the diagram, there would have been no need for the diagram for the survey carried out on 28 March 1990. In this particular aspect, her evidence is suspect. But it does not mean that the whole of her evidence is to be disbelieved. What her evidence brings into question is whether it was after the first survey report on 10, 12 & 13 March 1990, or it was after the second survey report on 28 March 1990, that Karintina through either Yvonne or Raymond knew something was wrong with the declarations of Greenfern. It does not in any way make her denial of the alleged conversation with Nicholas regarding the cocoa in the other 4 stores less acceptable.

Whether Wrong Proven

Mr. Robertson had conceded that, provided the facts are proved, the liability of Cornelder could be in both tort and in contract. As a result of my findings, *supra*, I am of the view that Cornelder was in breach of contract by surveying not only the cocoa in the Greenfern store but had also, without informing Karintina, surveyed cocoa in other stores. Cornelder was also guilty of a tortious act when they reported a total of 634.2500 mt of cocoa were in the Greenfern store when in fact there were only 394.2500 mt. The facts which I have earlier adverted show that Karintina had relied on the said survey reports of 10, 12 & 13 March 1990, and as a result thereof thought there was only 226.3125 mt of cocoa missing. The rest of the evidence ought to be narrated for the purpose of the assessment of damages they are these.

Yvonne after the receipt of these two reports, where the presence of 634.2500 mt was reported, and after comparing the figures in the declarations of delivery of cocoa to the Greenfern store by Greenfern, where 860.5625 mt were declared (P121), dicovered the discrepancy and alerted Raymond. Karintina then on 14 March 1990, telexed Tommy to ask him to account for the missing 226.3125 mt. Tommy replied by saying Greenfern would pay RM375,000 by cheque for 200 tons under two repurchase contracts. This leaves a balance of 26.3125 metric tons which Karintina considered an insignificant amount and merely requested Tommy to replace the amount as soon as possible. Karintina replied Greenfern on 15 March 1990, to complain that they still have not received payment and to warn against any further removal of the cocoa without their permission. The money was finally paid on 21 March 1990. On 27 March 1990, Yvonne received a diagram from Greenfern alluding to the presence of certain amount of cocoa in the Greenfern store, that is 9,982 bags of cocoa comprising 4,320 bags of 110/100 bean count (meaning 110 beans per 100 gram), 4,160 bags of 110/100 bean count and 1,502 bags of 150/100 bean count. I pause here to state that the lower the bean count, the better the price the cocoa will fetch. Yvonne then transmittted by facsimile the said telegram to Cornelder preceded by a telex instructing them to do a survey according to the

diagram. The survey was carried out and Cornelder reported a total of only 1,589 bags of cocoa, comprising 396 bags (24.75 mt) of 109/100 bean count and 1,193 bags (74.5625 mt) of 153/100 bean count which is a far cry form the figure of 9,982 bags declared by Greenfern. A diagram was also forwarded by Cornelder of Karintina showing the location in the Greenfern store of all these bags of cocoa. Raymond was shocked upon receiving those reports because there should be, according to the declarations of Greenfern about 623 mt whereas the said latest report of Cornelder only show a presence of about 99 mt. It was after this that Philip Pierre Maurice Monbiot ("Philip"), a director of Karintina and who was and still is resident in London, came into the picture after being informed by Raymond as to the unaccounted for cocoa. He issued instruction to have the remaining cocoa in the Greenfern store sezied and taken to Cornelder and this was done by Cornelder and warrants were issued in respect of these cocoa. It was round about 25 April 1990, that he received a copy of the said letter of Greenfern dated 12 March 1990, by which, it will be recalled, Greenfern had asked Cornelder to include in their reports cocoa in other stores other than the Greenfern store, and he immediately went about seeking clarification from Dick. After a series of exchanges of telexes and letters, the writ was issued. The law has now to be considered.

Whether Damages Too Remote

I have to remind myself that damages can only be recovered if there is a wrong, be it a tort or a breach of contract because even if a loss has been incurred, no damages can be awarded in the absence of a wrong. It is *damnum sine injuria*. See *Borhill v. Young* [1943] AC 92, 106, per Lord Wright. Once the wrong is established, the next question to consider is the extent and the measurement of the liability. Since Karintina's claim is based both on contract and on tort, it is relevant to determine whether the measure of damages in contract and tort is the same. The question must be dealt with in order to decide whether it is necessary to consider the question of damages separately, first in contract and then in tort. *McGregor on Damages*, 15 edn., para. 735, is of the opinion, and I respectifully agree, that the law as to remoteness of damage would appear to be the same in contract and in tort as far as the causation aspect of remoteness is concerned, but the scope or the protection afforded to the plaintiff is sometimes wider in tort and sometimes wider in contract,

As for the position in contract, a recent restatement of the law can be found in *Malaysian Rubber Development Corp. Bhd. v. Glove Seal Sdn. Bhd.* [1994] 3 MLJ 569, 575; [1994] (3) AMR 46:2407, 2414-2415; [1994] 4 CLJ 783, 790:

> ... it is important to bear in mind that the normal measure of damages for breach of contract in this country is prescribed by s. 74(1) of the Contracts Act 1950, which is the statutory enunciation of *Hadley v. Baxendale* [1854] 9 Ex 341 (*Teoh Kee Keong v. Tambun Mining Co Ltd* [1968] I MLJ 39; *Bank Bumiputra Malaysia Bhd Kuala Terengganu v. Mae Perkayuan Sdn. Bhd. & Ors* [1993] 2 MLJ 76, SC). In essence, the section states that the party may recover any loss or damage for any breach which: (a) naturally arose in the usual course of things; or (b) which the parties knew, when they made the contract, to be likely to result from the breach of it. For the sake of completeness, it should be mentioned that our Courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v. Baxendale*, which is, the party may recover damages which may 'reasonably be supposed to have been in contemplation of both parties, at the time they made the contract'. See *Associated Metal Smelters Ltd v. Tham Cheow Toh* [1971] 1 MLJ 271. The English equivalent to our s. 74(1) is s. 50(2) of the Sale of Goods Act 1979, which was framed in terms of the first rule in *Hadley v. Baxendale* (*McGregor an Damages* (15th Edn.) at para 835). Thus, s. 50(2) states that the measure of damages is the estimated loss directly and

> naturally resulting, in the ordinary course of events, from the buyer's breach of contract. If there is clearly no available contract, then, consequential loss apart, the damages will be assessed at the contract price less the value of the goods to the plaintiff at the time of the breach, which value is likely to be based upon the price at which the goods are eventually sold (*ibid*., at para 836) ...

Therefore, for damages in contract, the test appears to be whether the loss or damage "arose in the usual course of things" or "which the parties knew, when they made the contract, to be likely to result" (equated with the test of "resonably be supposed to have been in contemplation of both parties at the time they made the contract").

As for the measurement of damages in tort, the general rule was stated by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* [1880] 5 App. Cas. 25, 29 as: "that sum of money which will put the party who has been injured,or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation." and this rule was said to apply also to contract (*McGregor, ibid.*, para. 10). As with all general rules, it is subject to limitations and this is how *McGregor, ibid.*, at para. 12, puts it:

> The general rule is however only a starting point, for upon it a number of important limits are engrafted which may result in the plaintiff recovering less than the amount which would put him in the position he would have been in had the tort or breach of contract never been committed. Rigorously to insist upon such full compensation would be too harsh upon defendants.[41] The loss for which the plaintiff will be compensated is cut down by a variety of factors: thus he cannot recover damages for that part of the loss due to his contributory negligence[42], nor for such loss of which the defendant's conduct is not the cause[43], nor for such loss which is not within the scope of the protection of the particular tort or contract, nor for loss which he should have avoided[44], nor for loss which is too uncertain[45], nor for some past and prospective losses. ...many of them are frequently grouped under the compendious term "remoteness of damage."...this umbrella use of "remoteness of damage" can serve to point to the common denominator of these various factors: they all delimit the consequences and losses for which the plaintiff can recover compensation. In this way the term "remoteness of damage" can be distinguished from the term "measure of damages," the former referring to the consequences and losses for which the plaintiff can recover compensation, and the latter referring to the method of calculating the compensation for the particular consequence or loss.

Thus, for tort, the damages must not be remote. Since the wrong in this case is the mis-statement in the survey reports of the quantity of cocoa in the Greenfern store, which survey reports were made pursuant to a contract entered into between the parties, the wrong gives rise to an action in both tort and contract as was the case in *Caparo Industries plc v. Dickman* [1990] 1 All ER 568 HL, 568:

> The damage which may be caused by the negligently spoken or written word will normally be confined to economic loss sustained by those who rely on the accuracy of the information or advice they receive as a basis for action. The question what, if any, duty is owed by the maker of a statement to exercise due care to ensure its accuracy arises typically in relation to statements made by a person in the exercise of his calling or profession. In advising the client who employs him the professional man owes a duty to exercise the standard of skill and care appropriate to his professional status and will be liable both in contract and in tort for all losses which his client may suffer by reason of any breach of that duty.

It seems to me that our the present case is within the category (3) of the class or classes enumerated by Hobhouse J in *Forsikrings Vesta v Butcher* [1986] 2 All ER 488, 508 where it is said:

The question whether the 1945 Act applies to claims brought in contract can arise in a number of classes of case. There categories can conveniently be identified.

(1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendants.

(2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.

(3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

I will return to this case and the report of this case at the appellate stage when I consider the question of contributory negligence. I am of the view that, in the circumstances of this case, whether you apply the test in contract or the test in tort, the same result would be obtained because if the damage did not arise in the usual course of things or was not in the contemplation of the parties (the test in contract) then it would also be remote or not foreseeable (the test in tort) and conversely. In fact, the same legal principle applies, more or less, when considering the question of damages. I would approach the issue of damages from the angle of remoteness. Remoteness has two aspects, the first of which concerns causation and in regard to this aspect the question to be answered is whether Cornelder caused the particular damage to Karintina while the second aspect conerns the scope of protection and this involves answering the question whether the law protects Karintina from the particular damage they have suffered. See *McGregor, ibid*., para 122. Of course, the answer to the first issue must be in favour of Karintina before the scope of protection falls to be considered. The facts have to be recapitulated with some elaboration for the purpose of finding first, the answer to the question of causation.

Causation

Karintina had been dealing with Greenfern since 1983 but it was only for the period after 1 January 1989, that the exact nature of their relationship was set out in the agreement which also refers to an agency agreement that had governed their relationship hitherto but was not produced. Under the agreement, Karintina had advanced money to enable Greenfern to purchase cocoa which Greenfern was obliged under the agreement to offer to sell to Karintina first. For the cocoa in question, seven advances totalling RM2,525,200 were between 23 January 1990, and 20 February 1990, given by Karintina to Greenfern. See Table, *supra*. Each advance appears to be specifically for cocoa to be delivered by Greenfern to Karintina which a contract or contracts would thereafter be entered as soon as the cocoa were to be sold to Karintina and delivered to the Greenfern store. It was thus that the nine contracts set out in the Table, *supra*, were entered into between 16 February 1990, and 12 March 1990, under which Karintina had agreed to buy from Greenfern a total of 1,150 mt of cocoa and out of which 705 mt were alleged in several declarations (P144, P147, P149, P150-P156) made by Greenfern between 16 February 1990, and 8 March 1990, to have been delivered to the Greenfern store. (I cannot find any declaration to support the delivery of 30 mt for the contract 504/1083.) On 12 March 1990, Greenfern in one declaration (P121) gave details of all the cocoa that were allegedly already delivered to the Greenfern store in respect of the said nine contracts (two contracts bear the same number of 540/1075 and two, the same number of 504/1085) and they amounted to 725 mt (of bean count 110/100) and 125.5625 mt (of bean count 150/100) of cocoa was also declared. The total value of these cocoa was on 12 March 1990, declared by Greenfern to be worth RM1,571,343.75 (RM1,383,000 plus RM188,343.75). But, according to Cornelder's inaccurate reports, there was only 526.1875 mt (of bean count 111/100) and 108.0625 mt (of bean count 145/100) making a total of 634.2500 mt. Nicholas

testified that at that time there were only 374.25 mt in the Greenfern store which is very much less than the figure of 860.5625 mt declared by Greenfern on 12 March 1990 (P121). It will be recalled that it was as a result of relying on the survey reports of Cornelder, after comparing the figures given by Cornelder with that given by Greenfern and not knowing that the figure of 634.2500 mt given by Cornelder included cocoa which were not in the Greenfern store, that Yvonne was led to believe that there was only an amount of 226.3125 mt missing from the Greenfern store. She thereafter asked Greenfern to account for the missing 226.3125 mt of missing cocoa. If she had known that the survey reports of Cornelder were false, she might have pursued cocoa missing to the tune of 486.3125 mt. As said earlier, she instead was led to believe by the survey reports that only 226.3125 mt of cocoa was missing for which she was supposedly able to make Greenfern make good by paying the sum of RM375,000. I have no doubt that it was a result of the inaccurate survey reports given by Cornelder that Karintina, instead of pursuing the missing 486.3125 mt was only doing so for 226.3125. That was the damage done to Karintina and it was a result of the inaccurate survey reports. The question relating to the first aspect of remoteness of damages, that is causation, is therefore answered in favour of Karintina. I am aware that the causation test had received strictures in *Overseas Tankship (U.K.) v. Morts Dock and Engineering Co. (The Wagon Mound)* [1961] 1 All ER 404 PC, 411, where Viscount Simonds said one may be "led astray by scholastic theories of causation." The *Wagon Mound* reinstated the foreseeability test. Even applying the foreseeability test, the facts of this case justify the conclusion that it was foreseeable Karintina would rely on the survey reports. It is a matter of taking different analytical routes to arrive at the same conclusion. This brings me to the second aspect of remoteness which is, as mentioned earlier, the scope of protection.

Scope of Protection & Contributory Negligence

Reservation was also expressed in the way I have adopted in dealing with damages by Denning LJ in *Roe v. Minister of Health* [1954] 2 QB 66, 85 (C.A.) in this way:

> The three questions, duty, causation and remoteness, run continually into one another. It seems to me that they are simply three different ways of looking at one and the same problem... Instead of asking three questions, I should have though that in many cases it would be simpler and better to ask the one question : is the consequence within the risk? And to answer it by applying ordinary plain common sense.

But, the same answer will be obtained whether the question to be answered, is whether the consequence is within the risk or is the consequence within the scope of protection or is it reasonably foreseeable but the path I have chosen appears to me to be more methodical and serves another purpose which I will advert to later. The contentions of Karintina will now be adverted to with regards to the issue of the scope of protestion. Philip maintians that Karintina had by 13 March 1990, paid for 634.25 mt of cocoa but what was left at Greenfern store on 29 March 1990, was 85.455 mt which Cornelder seized on behalf of Karintina. Therefore, according to him, there was a loss of 548.795 mt. It will be recalled that Cornelder had wrongly reported that there was 634.25 mt when there was only 374.25 mt. Even this amount was later wrongfully removed because, after being instructed by Karintina on 27 March 1990, Cornelder on 28 March 1990, found only 99.3125 mt in the Greenfern store (comprising 24.75 mt of bean count of 110/100 and 74.5625 mt of bean count 150/100). It was only after this that Cornelder, upon the instruction of Karintina, seized and removed the cocoa from Greenfern store. By now, only 85.455 mt was recovered. Even then, only 78.6 mt were regarded as cocoa while the rest were waste which fetched RM4,227. Philip maintained that because of the false survey reports, Karintina had lost 634.25 mt which market value when obtained should be reduced by the amount of RM4,227 the price obtained by the sale of the waste that were

seized from the Greenfern store. The market price, argued Philip, should be worked out by reference to the price quoted by the London Cocoa Terminal Market on 28 March 1990, plus a sum for storage and interest for holding the cocoa until May 1990 but less a differential. The formula was very well stated by Philip in his evidence and I can do no better than set out his evidence in this regard, *viz*:

> Most cocoa disputes resolved at arbitration and it is a default which is considered at arbitration. The arbitrators will tend to value the cocoa in default in relation to one of the 2 major future markets which are in New York and in London. That is the most transparent way of putting a value as to the loss and is the least you can do to mitigate it. So when we received news of second survey on 28/3 in the late afternoon and the clear reference point, in my opinion, for the calculation of that loss is the London opening price of that day. So the price should be established at the London opening. Having determined what the London opening was the next part of the valuation of the loss is to discover what the differential for Sabah cocoa delivered in store Tawau was against the London futures at that time. In order to determine the differential at the time we could recover the loss. I have taken KLCE price at US$1030/T. I have taken the contract price (P186) £140 under May. I took PW5's price of 28/3/1990.
>
> I took PW5's price of $2,639/mt with a view to finding the average of the 3 prices. Therefore US$1,030 at exchange rate of US$1.6262 = £633. I obtained the rate from reading the 29 March edn. of the Daily Express.
>
> The London price of 28/3 at the opening level was £755 (P187). The difference between KLCE and London price is £122. That was the differential against London at which you could deliver into a Tawau approved warehouse for value 1/5/1990. We need the differential for 28/3 and so we have to take into account cost of carrying that cocoa from 28/3 until 1/5 which principally is storage and interest which is worked at KLCE rate of RM3.50 per week per mt which for 5 weeks at exchange rate of 4.43 comes up to £4. To that we add interest at 9% for 5 weeks would give £5 which added together could give a spot differential of £131 under May of KLCE of 28/5/1990. As for PW5's price of RM2,639, it is arrived this way. London May settlement price on 27/3 was £747. London due on 28/3 £2. That gives £749. So we take the exchange rate from Daily Express (p. 188) and divide RM2,639 by exchange rate and deduct the London price of £749 gives a differential of £153. So the average of 131, 140 and 153 gives £141 under May. So the value of the cocoa at the close out at London opening is £755 - £141= £614. Multiply that by exchange rate of 4.4275 gives RM2,718 which I say is the fair market price in which to value the loss. That price of RM2,718 is for 110/100 bean count but the cocoa under dispute was inferior and have an average of 116.8/100. The prevailing discount for inferior bean counts were £2 per bean from 110/100 to 120/100 and £3 per bean for bean count higher than 120/100. So the market discount for 116.8/100 would be £14 for 7 beans which gives RM62 per tons. This has to be discounted from the price of RM2,718. The price therefore becomes RM2,656 and the amount claimed is RM1,684,568. This is derived by multiplying RM2,656 x 634.25 tons. So the value of the cocoa recovered has to be deducted.
>
> In defendant's warrants relating to seized beans they did not state the beans count for warrant no. 130. So we rely on another report but P15 supports the figure so too for warrant 131. For warrant 134 the count was stated as 117/100. So I took the average of the 3 (151, 112 and 117) and obtained an average of 138.5/100.
>
> The market discount for 138.5/100 rounded to 139/100 is £77 based on formula earlier mentioned. At 4.43 x 77 = RM431. So in order to determine value of cocoa beans recovered we take RM2,718 less RM341 = RM2,377/ton. We multiply this by 77.35 tons which produce RM183.861 which we give credit for the cocoa we seized. We also give credit for the flat and cluster beans according to the sales contract P184 and 185 which were respectively for

RM1/kg and 60 cents/kg. The value obtained were RM1,870 and RM2,940. After deducting these amounts of RM183,861, RM1,870 and RM2,940 from RM1,684,568 would give a figure of RM1,495,897.

Before adverting to the manner in which the damages is calculated and claimed by Philip on behalf of Karintina which he spelt out in the evidence, *supra*, it is important to bear in mind the when Cornelder on 10, 12 & 13, March 1990, surveyed the Greenfern store, they over-stated the quantity of cocoa present in the Greenfern store. Cornelder had stated the presence of 634.2500 mt when there was, according to Nicholas, only 374.25 mt. This resulted in Karintina, after placing reliance on the survey reports, pursuing Greenfern for only 226.3125 mt because it was that quantity that was supposedly missing since Greenfern had declared delivery to Greenfern store of 860.5625 mt as against the reported presence of 634.2500. Therefore, if Cornelder had instead reported there was only 374.25 mt in Greenfern store, Karintina, instead of pursuing only the quantity of 226.3125 mt, might have asked Greenfern to account for 486.3125 mt. Thus, Karintina failed, on account of the inaccurate survey reports, to pursue another 260 mt. Therefore, Karintina estimation of its damages is founded on the wrong premises that Cornelder had caused them to lose 634.25 mt of cocoa. All reckoning must be with reference to 260 mt of cocoa which Cornelder had reported to be in Greenfern store when in fact they were not. When the cocoa were again surveyed, this time on 28 March 1990, only 99.3125 cocoa were found and when the cocoa were seized on 29 March 1990, only 84 mt were recovered. Mr. Robertson submitted that Cornelder is not to be blamed for the losses because, according to Mr. Robertson, Karintina was negligent.

Cornelder contends that Karintina had failed to take measures to protect their stock of cocoa after being informed through the survey reports that 226.3125 mt of cocoa was missing. Mr. Robertson contended that Karintina should have on 14 March 1990, after the receipt of the survey reports, "secured their position" without elaborating what steps Karintina should have taken for that purpose and what was meant by the words he had used. By not taking the measure, Karintina was the author of their own misfortune. Miss Peggy Liow, on a point of law, submitted that contributory negligence has no place in contract law. However, learned Counsel draws the Court's attention to the case of *Forsikrings Vesta v. Butcher* [1988] 2 All ER 43 (the case at the first instance had already been adverted to, *supra*,) which runs counter to her submission but she maintained that the case is not applicable here because Cornelder's liability in tort is dependent upon their liability in contract and that their tortious liability would not exist if not for the contract. The relevant facts of *Forsikrings Vesta v. Butcher* are these. An insurer had insured a fish farmer and the risk was in turn, through a broker, re-insured. The fish farmer could not accept a condition of the insurance that there should be a 24-hour watch over the fish farm. A breach of this clause requiring 24-hour watch cannot vitiate the insurance under the Norwegian law. The broker was informed over the telephone by the insurer to obtain the consent of the re-insurer to dispense with the 24-hour watch but the broker did not carry out the instruction and the insurer also did not follow through. The insurer, after settling the claim of the fish farmer, sued the re-insurer who was not successful in pleading that the English law vitiated the re-insurance because of the breach of the condition of 24-hour watch since the contract was governed by Norwegian law which does not vitiate the contract of insurance. The insurer also sued the broker in contract and tort for not informing the re-insurer that the fish farmer could not accept the 24-hour watch condition and the broker's defence was that the insurer was to be blamed for not following-up the matter with the broker. One of the issue, that is relevant to our case, was whether there is power to apportion under the Law Reform (Contributory Negligence) Act, 1945. As for the basis of the claim in that case O' Connor LJ at p. 47 said:

I start by pointing that Vesta (the insurer) pleaded its claim against the brokers in contract and tort. This is but a recognition of what I regard as a clearly established principle that where under the general law a person owes a duty to another to exercise reasonable care and skill in some activity, a breach of that duty gives rise to a claim in tort notwithstanding the fact that the activity is the subject matter of a contract between them. In such a case the breach of duty will also be a breach of contract. The classic example of this situation is the relationship between doctor and patient.

To that example, I would add the relationship between a commodity surveyor and his retainer which is the relationship between Karintina and Cornelder. Another illustrative example of that type of relationship is the case of *Sayers v. Harlow Urban District Council* [1958] 2 ALL ER 342 where a woman paid to use a public toilet and hurt herself in the process of trying to climb down to return to her position after unsuccessfully scaling the partition in an attempt to get out of the cubicle because she was locked in on account of a defective lock. It was held in that case that the damage was not too remote because it was reasonable in the circumstances for the woman to try to see whether it was possible for her to climb out of the cubicle, which was not a very hazardous thing to attempt, but having found it impracticable to achieve, she was careless in the process of returning to the ground by allowing her balance to depend on the toilet roll. It was also held that damages would be reduced by one quarter in respect of her share of the responsibility for the damage.

Given the cases I have just referred to and which I follow, it is untenable to argue that the Court cannot apportion the blame in the present case. With that I will now return to the question of the extent of the blameworthiness on the part of Karintina. For this exercise, it has to be determined what measures ought reasonably to have been taken by Raymond and Yvonne after they have received the survey reports on 14 March 1990, and on the basis that the reports revealed another 260 mt of cocoa missing from the Greenfern store instead of just the 226.3125 mt. That is, what would or should Karintina do on 14 March 1990, if they knew 486.3125 mt of cocoa was missing from Greenfern store. Unfortunately, Raymond was not asked what he would do if he knew 486.3125 mt. of cocoa was missing. He merely adverted to the fact that he pursued Greenfern for an explanation as regards only 226.3125 mt. It is the same with Yvonne. As for Philip, he was informed of the missing 226.3125 mt. through a copy of the following telex transmitted on 15 March 1990, by Karintina to Greenfern, and copied to him, *viz*:

Att: Tommy

Re Refer To Your Fax NR279/90/F

We are very disappointed and unhappy with the way you are handling this matter.

Firstly, we were not informed about taking away the beans to your buyer.

Secondly, you didn't pay us as promised. We took away the beans on 12 Mar 90 or much earlier nobody knows and until now you only settled part by delivern beans to Cornelders Tawau 60 tons y'day.

Based on today's price 90% is RM2200P/T and you actually hv to deliver us 170tons inorder to settle the 200tons that you took away quietly without our consent.

Plse ensure settlement is done by latest tomo and you hv to fax us the docs failing which please return back beans.

We like to warn you that in future you have to get our consent before moving out any of the beans that belongs to us.

> We also noted that yr stock confirmation under NR 277/90/f the total tonnage did not agree with Cornelders reports. We noted there was shortage of more than 20tons. Plse ensure you put back the tonnage according to your report soonest and also give us yr explanation for the shortage as we have left the cocoa in yr care.

Mr. Robertson argued that though the survey reports were not accurate, they at least alerted Karintina to the fact that 226.3125 mt. of cocoa was missing and it was unreasonable of Karintina to have let things remain as they were. I presume what learned Counsel meant to say was that if Karintina had taken control of the Greenfern store immediately upon realising that Greenfern had been, what I would term, stealing, Karintina would have realised that another 260 mt was missing. As was mentioned earlier, Karintina had immediately upon receipt of the survey reports asked Greenfern to account for the missing cocoa and this resulted in the payment on or about 21 March 1990, of RM3,75,000 by Greenfern to Karintina. This leads me to ask whether Karintina would have taken the same course, that is to merely ask Greenfern to account and to pay, if they were informed of the true position, which was that 486.3125 mt was missing. As mentioned earlier, neither Raymond nor Yvonne reveal as to what steps they would have taken if they knew 486.3125 mt was missing. Going back to the missing 226.3125 mt which Raymond, Yvonne and Philip were all aware, I pose the question of whether it was prudent of them to continue to trust Greenfern or Tommy whom they, by 14 March 1990, knew to be a thief. We are not talking about pittances but 226.3125 mt that was missing from a stock of 860.5625 mt which Karintina had paid for and that is more than 25%. This should have spurred Karintina to action. Karintina should have immediately on 14 March 1990, instead of 28 March 1990, instructed Cornelder to seize and remove whatever cocoa was in the Greenfern store or sealed the Greenfern store. This was not done. Karintina should by then know that it must be because Tommy or Greenfern was impecunious that 25% of the cocoa was missing from the stock. It should have been obvious that the only way Tommy or Greenfern could replace or pay for the missing cocoa was to sell from the stock of Karintina which was still lying in the Greenfern store. I am justified in that conclusion because as matters turn out, only 85.455 mt was found in the Greenfern store on 29 March 1990. If the RM375,000 which Greenfern paid Karintina on 21 March 1990, did not come from the sale of the stock of Karintina's cocoa in the Greenfern store, from what source could Tommy or Greenfern have obtained the fund. I would venture to guess that if Karintina had seized the cocoa on 14 March 1990, they would not have received payment of the sum of RM375,000 because Greenfern does not have that money and there is no evidence to suggest they have and the money, as I said earlier, must have come from the proceeds of the sale of cocoa from the stock. In fact, the evidence show Karintina had obtained a multi-million judgment against Greenfern and had made Tommy a multi-million bankrupt testifying to the impecuniousness of Tommy and Greenfern. Coming back to the issue, given the fact that Karintina already on 14 March 1990, discovered a thief as their caretaker of their stock of cocoa, it was not reasonable conduct for Karintina to have continued to place their trust in the thief in the person of Tommy or Greenfern by letting them have continuing access to the stock of cocoa in the Greenfern store. Whatever trust that was built up over the years should have vanished by the discovery of the disappearance of the cocoa and the missing cocoa should not, on account of its sizeable amount, be dismissed, as was done by Philip, as a single act of transgression to be forgiven. I am of the view that it was precisely this latitude that had encouraged the further disappearance of the cocoa after 14 March 1990. The dissipation of the cocoa from the Greenfern store was entirely the fault of Karintina. Karintina was the author of their own misfortune in continuing to trust a thief. Even if Karintina had acted on 14 March 1990 and seized the cocoa, there was only 394.2500 mt. There would still be a shortfall of 466.3125 mt and the survey reports of Cornelder would not have made

any difference to the fact that 466.3125 was already missing. That Karintina was not able to recover the missing cocoa or the money representing the cocoa was due not to the survey reports but the impecuniosity of Tommy or Greenfern. Therefore, I am of the view that though Cornelder were negligent in submitting their inaccurate reports to Karintina, they were not answerable for the missing cocoa or the losses arising from such missing cocoa. I would therefore only award nominal damages of RM1 to Karintina and costs to be taxed and paid by Cornelder. I will still consider the quantum in case I am wrong in what I have just concluded.

Damages

The damages claimed are:

(1) the difference between the value of the quantity of cocoa (634.25 mt) reported in the Greenfern store on 13 March 1990, and the value of quantity recovered (85.455 mt) on 29 March 1990;

(2) loss on forward contracts; and

(3) reimbursement of the payment of RM2,854.12 for survey fees.

Value of Cocoa

It was submitted by Mr. Robertson that credit should be given to Cornelder for the 99.3125 mt of cocoa that were present in the Greenfern store on 28 March 1990, and not merely 84 mt which was recovered because Karintina had not taken prompt action to prevent any further dissipation of the cocoa. I agree with Mr. Robertson that the loss of this 13.855 mt has nothing to do with Cornelder and I cannot see how Cornelder could be held accountable for, we can assume, the misappropriation by Greenfern. Since it was not argued the manner in which Philip had computed the market price, *supra*, was faulty I will have to take it that it is accepted. This means the figure has to be adjusted because the loss which Cornelder was responsible was only in respect of 260 mt which when multiplied by the market price of RM2,656 per mt would give a total of RM690,560. Credit must be given for the cocoa seized which quantity should be 99.3125 instead of 84 mt. Out of this 8.105 mt consisted of flat and cluster beans which were sold for a total sum of RM4,810. This leaves a balance of 91,2075 mt which when multiplied by the market price of RM2,377, a market price worked out by Philip and not challenged, would produce the round sum of RM216,800. Therefore the amount Karintina is entitled to recover from Cornelder is:

	RM 690,560
less	RM 4,810
less	RM216,800
Balance	RM368,950

Loss on Forward Contracts

Karintina also claimed that they have suffered loss and damage on forward contracts which they did not "close up" until 28 March 1990 which was by then less advantageous to do so. In this aspect, Karintina had entered into the following forward contracts with Greenfern, *viz* :

Date	Contract No.	Particulars
12 September 1989	504/957	250 tonnes @ £200 per tonne under respective terminals. Greenfern had option to repurchase at £165 under respective terminals anytime before 12 November 1989. Shipment: April 1990 - 100T May 1990 - 100T June 1990 - 25T July 1990 - 25T
01 December 1990	504/1031	150 tonnes @ £190 under May 1990 LCTM Shipment: April 1990/May 1990 - (75T per month)
01 December 1989	504/1032	100 tonnes @ £190 under July 1990 LCTM Shipment: June 1990/July 1990 - 50T per month
03 January 1990	504/1055	100 tonnes @ £185 under May LCTM Shipment: April 1990 - 50T May 1990 - 50T

The nature of forward contract has to be explained in order to grasp what this aspect of the claim is all about. A forward contract provides for a certain quantity of cocoa for delivery in future either in one or in several parcels. As for the price of the cocoa in a forward contract, it is not stated precisely but by reference to a differential that is, the price will be the price quoted in the London Cocoa Terminal Market (LCTM) less the agreed differential stated in the contract. Take for example, the contract 504/1031, dated 1 December 1989, *supra*, which is a contract for 150 tonnes at a differential of £190. This differential is to be deducted from the May 1990 price quoted by LCTM. A little of the workings of LCTM has to be explained in order to understand the contractual relationship of Karintina and Greenfern. Unfortunately, I am unable to get any help from Counsel and Philip was not asked to explain. However, my ever resourceful research officer and Deputy Registrar scoured Tawau and borrowed a handbook called *Cocoa - A Trader's Guide* written by Mrs. Bronwyn N. Curtis and 6 other authors under the auspices of the International Trade Centre, with financial assistance from the Government of Sweden and with comments by the United Nations Conference on Trade and Development (UNCTAD) and the General Agreement on Tariffs and Trade and the International Cocoa Organisation. The LCTM, established in 1928, is a cocoa commodity exchange dealing in the exchange of promises to buy and sell commodities without the expectation that physical delivery would ever take place and this is also known as futures contract though physical delivery can be called for. Commodity exchanges were developed

to protect market operators against volatility of commodity prices and to enable producers, consumers and processors to moderate their exposure to price fluctuations while at the same time it serves to attract speculators with the result of enhancing the liquidity of the leading markets. The LCTM, and other exchanges as well, provides the most efficient mechanism for determining a market price. The LCTM price is used as the benchmark for physical transactions. Trading in the LCTM involves merely paper transactions where LCTM acts as the clearing house. The prices in the LCTM may move up and down hourly and daily and only 5 months in a year are traded, that is March, May, July, September and November. You can buy or sell lots of cocoa for any future month at the price you think will later fetch you a profit when you decide to sell the lots. When you sell, you must also buy a corresponding amount as otherwise, you may end up being either "short" and having to deliver or being "long" and having to accept physical delivery of the cocoa; in this situation, the cocoa delivered may be totally unsuitable to one's physical contractual obligations. But the situation favours a dealer who sells on a forward contract because he can deliver his cocoa against a short futures position, as he has the choice of type and location of the physical delivery against a futures contract and this feature makes the futures contract particularly suitable as a hedge. Cocoa traders the world over will have access to information of the movement of the prices of the commodity exchanges. It is in reference to those prices quoted by LCTM that Karintina and Greenfern entered into their forward contracts. The prices of the forward contracts can be finalised by agreement of the parties as was done for the said contract 504/1031 where by two addenda dated respectively 15 December 1989 (P190) and 18 January 1990 (P191) the prices for the 150 mt were, after deducting the differential from the LCTM prices, fixed at £485, £480 and £465 per mt. The mechanism governing the fixing of the prices is, as mentioned earlier, set out in the agreement. It is against this backdrop and a printout of the LCTM showing the March 1990 prices for the futures contracts that Karintina again argued that if Cornelder had correctly reported the tonnage of cocoa in Greenfern store, the said contracts would have been closed on 13 March 1990 when the LCTM price was more favourable instead of on 28 March 1990. This had resulted in Karintina losing £16 per ton of the unfixed contract which totalled 140 tons, which gives, at the exchange rate of 4.4274, a sum of RM9,918. As for the fixed contracts amounting to 85 tons, it is alleged there was a price difference of RM290 per ton between the said two dates which thus gives a total of RM24,650. As for another 75 tons of the fixed contract, a price difference of £32 was alleged to exist and this when multiplied by the said 75 tons at the exchange rate of 4.4275 gives a sum of RM10,262. The total of the three sums amount to RM45,194 which Karintina claims they lost on forward contracts. Whatever it is, Cornelder is, for the reasons I have already stated, only responsible for not alerting Karintina to the disappearance with regard to only 260 mt which means Cornelder, if they are liable, would only be liable for 260 mt of the said forward contracts not being "closed up" on 14 March 1990. Thus, after allotting 140 mt of this 260 mt as being for unfixed contract, this would leave 120 mt which for want of evidence from Karintina I will allot this as coming under the contract that suffered a price difference of £32 which means, a loss of RM17,000 (rounded up). This means the total for this claim, if allowed at all, should only be RM26,928 (RM9,918 + RM17,000). In physical trading of cocoa, the profit can easily be ascertained which is the difference between the price Karintina had bought the cocoa and the higher price which Karintina had resold the cocoa. In this regards, there is no evidence and we can assume that the 260 mt which Greenfern had committed themselves to sell to Karintina had not been resold by Karintina. It is also not established that Karintina had sold or purchased features contracts in the LCTM where, because of the missing 260 mt, Karintina was placed in the "short" position requiring Karintina to off-set that by purchasing. There was no evidence whether Karintina did or did not

purchase future contracts from the LCTM to cover for the missing 260 mt. It was not explained what was meant by "close-up" of contracts which was mentioned by Philip. If he had by that expression meant entering into forward contracts with other seller to buy the equivalent amount of cocoa, then there is no evidence that Karintina had tried or at what price. If it was meant by that expression that Karintina had to go into the futures market to buy the equivalent amount of cocoa, there is also no evidence that Karintina had done so. If Karintina had done neither, I am in doubt as to whether Karintina had suffered, what the statement of claim described, as loss and damage on forward contracts. Philip never said whether Karintina is involved in dealings in the LCTM. If Karintina was not involved at all, then profit could only be measured solely on the difference in the contract price under which he had bought the cocoa and the price in which he had sold the same cocoa. In this regard, as I said earlier, there was a complete lack of evidence. If Karintina was involved in the trading of futures contract then Karintina must prove what the futures contracts were that they have entered into which made them suffer a loss because Karintina was allegedly, as a result of the missing 260 mt of cocoa, in a "short" position which forced them to buy futures contract at unfavourable prices. Therefore, this aspect of the claim has not been established even assuming that it was not too remote or reasonably foreseeable or the consequence was within the risk.

Reimbursement of fees

As for the claim for refund of the fees, amounting to RM2,854.12, paid by Karintina to Cornelder, this is also not allowed because services had been rendered albeit negligently but not totally wasted since the reports did alert Karintina to the missing cocoa.

Conclusion

In the premises, I allow judgment for Karintina for the nominal sum of RM1 since a wrong, though no loss, has been established (*Lo Khi On v. Tanjong Aru Hotel Sdn. Bhd.* [1994] 4 CLJ 550; [1994] 3 MLJ 766). Karintina is also awarded costs to be taxed and to be paid by Cornelder. This is the reason why I chose to approach the issue of damages in the way I have done. If I have not isolated the issues of causation and scope of protection and instead dealt with the issue as only one (as preferred by Viscount Simonds and Dening LJ, *supra*), it would mean Karintina had failed to establish their case because the damages were too remote and Karintina would have to pay costs to Cornelder. However, in this case, there was clearly a wrong though the loss could not be established. The law allows for nominal damages which I have awarded and this entitles Karintina to costs.

Solicitor's Duty

Certain events had taken place during the trial which gives rise to concern and which calls for comment. Discovery of documents were done in the midst of the trial and Philip even said he had not been advised to disclose all documents. I would take this opportunity to remind solicitors their duty to advise their clients on full disclosure and this duty has been stated thus by *Atkin's Court Forms*, 2nd Edn. Vol. 15, at p. 87 :

> Because many litigants have little appreciation of the scope of discovery and of the importance of making full disclosure, and neither know nor appreciate the obligation or requirement to search for and disclose to their adversaries all relevant documents, a solicitor should, promptly after the issue of the writ, take positive steps to ensure that his client appreciates the duty of discovery of documents and the importance of not destroying documents which might have to be disclosed, and in the case of a corporate client to ensure that knowledge of this burden is passed on to anyone who may be affected by it.[1] Indeed, the solicitor's duty does not stop at explaining to his clients that they must disclose all relevant documents which are or have been in their possession, custody or power, for solicitors owe a duty to the Court, as

officers of the Court, carefully to go through the documents disclosed by their clients to make sure, as for as possible, that no relevant documents have been omitted from their client's lists or affidavits of documents.[2] If the client insists on making what is, to the solicitor's knowledge, an improper list or affidavit the solicitor should withdraw from the case.[3]

If the solicitor is guilty of professional misconduct in this respect, for example, by allowing an incorrect or inadequate affidavit of documents to be made, he may be ordered personally to pay or to contribute to the costs of the action.[4]

Aside from that, it must be borne in mind that the relevancy of a document for the purpose of discovery is given a very wide and extended meaning. The classic statement of this rule is found in *Compagnie Financiere et Commercials du Pacifique v. Peruvian Guano Co.* [1882] 11 QBD 55 where it is said that every document relates to the matters in question in the action which not only would be evidence upon any issue, but also which is reasonable to suppose contains information which *may* (not which *must*) either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary, and it will directly or indirectly have this effect if it is a document which may fairly lead to a train of inquiry which may have either of these two consequences.